IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-822

THE RENEGOTIATION BOARD, *Defendant-Petitioner*
v.
BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO., INC., *Plaintiffs-Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS BANNERCRAFT CLOTHING COMPANY, INC., AND ASTRO COMMUNICATION LABORATORY IN OPPOSITION TO PETITION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 466 F.2d 345 and is appended to the Petition for a Writ of Certiorari. The orders of the District Court are unreported and are also appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

The sole question presented is whether the United States District Court for the District of Columbia properly stayed proceedings before the Renegotiation Board until the Board had complied with the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1970).

STATUTES AND REGULATIONS

The relevant portions of the Freedom of Information Act, 5 U.S.C. § 552 (1970), and the Renegotiation Act of 1951, 50 U.S.C. § 1211, *et seq.* (1970), are appended to the Petition.

STATEMENT OF THE CASE

On March 16, 1970, Bannercraft Clothing Company, Inc. (hereinafter "Bannercraft"), sent a letter to the Renegotiation Board (hereinafter "the Board") requesting that it produce for inspection and copying, pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1970), six separate categories of documents. In a letter dated April 29, 1970, Bannercraft was informed that the Board had determined that Bannercraft had realized excessive profits in the amounts of $75,000 out of a total profit of $253,000 in its fiscal year 1966, and $1,450,000 out of a total profit of $1,739,000 in its fiscal year 1967. Bannercraft was ordered to reply to this letter prior to May 12, 1970, and to state in its reply whether or not it would agree with the Board's determination. Failure to agree, the Board stated, would result in a unilateral final order directing Bannercraft to pay the entire amount asserted by the Board.

On May 1, 1970, Bannercraft filed, pursuant to 5 U.S.C. § 552, in the United States District Court for the District of Columbia, a complaint for an injunction requesting that the court enjoin the Board from withholding the documents which had been requested by Bannercraft. The complaint also requested that the Board be enjoined from conducting any further proceedings in connection with the renegotiation of Bannercraft's fiscal years 1966 and 1967 since the documents were important to Bannercraft's presentation of its case to the Board.

The District Court on May 6, 1970, stayed the Board from proceeding with the renegotiation of Bannercraft until further order of the court. After hearing, the court, relying on *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board,* 425 F.2d 578 (1970), determined that Bannercraft was likely to succeed on the merits, *viz.* it would be entitled to the documents, and entered a preliminary injunction on May 15, 1970 enjoining the Board from proceeding with the renegotiation of Bannercraft until the Board complied with the relevant provisions of the Freedom of Information Act. The Board, however, refused to comply with that Act and chose to file a Notice of Appeal with the United States Court of Appeals for the District of Columbia Circuit.

By letter dated April 20, 1970, Astro Communication Laboratory (hereinafter "Astro") sent a letter to the Board and requested that the Board make available to it for inspection and copying, pursuant to the provisions of the Freedom of Information Act, five classes of documents in the possession of the Board. By letter dated July 21, 1970, three months after the request was

made, the Board's General Counsel denied Plaintiff's request in its entirety and declined to produce any of the documents which had been requested by Astro. The decision of the General Counsel was affirmed by the Board on July 30, 1970.

Immediately thereafter, a hearing before the Eastern Regional Renegotiation Board was scheduled for August 24, 1970. On August 11, 1970, Astro filed a complaint in the United States District Court for the District of Columbia, requesting that the Board be enjoined from withholding documents to which Astro was entitled under the Freedom of Information Act and that proceedings before the Board be stayed until further order of the court.

The District Court, on August 21, 1970, enjoined the Board from proceeding with the renegotiation of Astro until the Board complied with the provisions of the Freedom of Information Act. The court directed the Board to permit Astro to inspect and obtain copies of all documents which the Board had no objection to producing and to submit those documents which the Board objected to turning over to Astro, to the court, for an *in camera* inspection within 30 days of the date of the court's Order, August 21, 1970.

The Board, however, declined to submit any of the documents to the court for *in camera* inspection and belatedly asserted Executive Privilege as to those documents. The court directed the Board to submit the documents to the court for an *in camera* inspection to review the claim of Executive Privilege and the claim of exemption from the provisions of the Freedom of Information Act, whereupon the Board chose to appeal both that order and the granting of the injunction

against further Board proceedings to the United States Court of Appeals for the District of Columbia Circuit.

The cases were consolidated for hearing in the United States Court of Appeals for the District of Columbia Circuit with the case of *David B. Lilly Co., Inc.* v. *The Renegotiation Board,* D.C. Cir. No. 71-1025. After oral argument on March 9, 1972, the Court of Appeals held that the proceedings before the Board had been properly stayed by the District Court and remanded the cases to the District Court for further proceedings and final decision on the merits of each.

ARGUMENT

Petitioner asserts that this decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Sears, Roebuck and Co.* v. *National Labor Relations Board,* 433 F.2d 210 (1970), and, in addition, is contrary to this Court's decisions in *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752 (1947) and *Lichter* v. *United States,* 334 U.S. 742 (1948). Each contention is without merit.

In *Sears, Roebuck and Co.* v. *National Labor Relations Board, supra,* the Court of Appeals for the Sixth Circuit found that:

> . . . the district court properly dismissed the complaint for lack of jurisdiction, since it does not have the power to enjoin or to review decisions of the National Labor Relations Board. [*Ibid* at 211]

In so finding, the court merely followed a long line of precedent which began with *Myers* v. *Bethlehem*

Shipbuilding Corp., 303 U.S. 41 (1938), holding that because of the provisions of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1970), vesting exclusive judicial review in the United States courts of appeal, the district courts are without authority to enjoin Board proceedings. Further, this Act, unlike the Renegotiation Act, *supra*, provides for a comprehensive due process administrative hearing before the Board. There is, then, no conflict between the *Sears* case and this case, which is based on the provisions of the Freedom of Information Act and the Renegotiation Act, and the congressionally intended nature of the renegotiation process.

In both *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, *supra*, and *Lichter* v. *United States*, *supra*, plaintiffs had requested the District Court to make determinations which would have had the effect of concluding the renegotiation proceedings, jurisdiction over which, in the first instance, had been placed with the Renegotiation Board and then with the United States Tax Court. Respondents here sought no relief as to the validity or application of the Renegotiation Act. The District Court was asked only to maintain the status quo of the renegotiation proceedings until the Renegotiation Board had complied with the Freedom of Information Act. Further, the cited cases were decided twenty years prior to the enactment of the Freedom of Information Act upon which the decision in this case is based.

In thus preserving the status quo, the District Court herein avoided the problem presented in *Grumman Aircraft Engineering Corporation* v. *The Renegotiation Board*, 425 F.2d 578 (1970), on remand 325 F.

Supp. 1146 (1971).[1] There, plaintiff filed a request with the Renegotiation Board for documents under the Freedom of Information Act during the pendency of its renegotiation proceedings. The Board refused to produce any of the requested documents and proceeded to a final determination against Grumman long before the court of appeals found that Grumman was entitled to the documents which it sought.

Petitioner asserts that this case presents an important question to this Court. We do not agree. The decision of the court of appeals was based upon the facts present in these cases and is therefore of limited applicability. The Renegotiation Board has attempted at every opportunity to make a sham of the Freedom of Information Act, engaging in constant litigation to avoid compliance with the Act. *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board, supra; American Manufacturing Company of Texas* v. *The Renegotiation Board,* D.C. Cir., No. 71-1760 decided October 19, 1972; *Fisher* v. *The Renegotiation Board* — F.2d — (D.C. Cir.), decided November 10, 1972; *Holly Corporation* v. *The Renegotiation Board,* C.D. Cal. No. 69-198 decided February 11, 1969; *Holly Corporation* v. *The Renegotiation Board,* D.C. D.C. No. 1239-70 decided May 12, 1970; *General Manufacturing Corp.* v. *The Renegotiation Board,* D.N.J. No. 965-70, decided November 5, 1970.

The same court of appeals which decided these cases has recently indicated that, given a set of facts slightly different from those contained herein, it would reach a

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[1] The Renegotiation Board has again filed an appeal in this case which is now pending in the United States Court of Appeals for the District of Columbia Circuit, No. 72-1425.

contrary result, *Sears, Roebuck and Co.* v. *National Labor Relations Board,* — F.2d — (D.C. Cir., No. 72-1425, decided October 24, 1972). In that case the court reaffirmed its finding that there is in the district court, "jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information Act claim" (Slip Op. at 3). The court went on to state:

> . . . However, as *Bannercraft* itself noted, "the bare existence of jurisdiction does not mean that appellees were entitled to the relief they were granted by the District Court." Slip opin. at 15. While Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), cannot be taken as mandating that such intervention is never warranted, it still has vitality as indicating that it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing of irreparable harm is an indispensable condition of such intervention. . . .
>
> In the case at bar we do not have a cogent showing, indeed we do not see a substantial showing, of how Sears will be irreparably harmed in its participation in the unfair labor practice charge without the Advice and Appeals memoranda whose disclosure is still under judicial consideration. . . . [*Supra* at 3-4]

It is therefore, apparent that the instant case will not have significant precedential value.

CONCLUSION

WHEREFORE, it follows that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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